

## **IV. PARTIES**

### **RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY**

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Maine. An insurer who has paid all or part of a loss may sue in the name of the assured to whose rights it is subrogated. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. When in proceedings in the nature of quo warranto the title to office in a private corporation is involved, the action may be brought in the name of the interested party and the Attorney General need not be a party thereto.

(b) Guardians and Other Representatives. Whenever a minor or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. A minor or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person. In any action in which there are or may be defendants who have been served only by publication and who have not appeared, the court may appoint an agent, guardian ad litem, or next friend to represent them.

(c) Subrogated Insurance Claims. No claim or counterclaim shall be asserted on behalf of an insurer in the name of the assured for damages resulting from alleged acts of negligence, claimed by right of subrogation or assignment, unless at least 10 days prior to asserting such claim the insurer gives notice in writing to the assured of its intention to do so. Such notice shall be served in the manner provided for service of summons in Rule 4 or by registered or certified

mail, return receipt requested, with instructions to deliver to addressee only. There shall be attached to the pleading asserting such subrogation claim a copy of the notice together with either the return of the person making the service or the return receipt. An assured or any party suing in an assured's right who desires to assert a claim arising out of the same transaction or occurrence shall notify the insurer or its attorney in writing within 10 days after receipt of such notice.

**Advisory Committee's Notes**  
**May 1, 2000**

Subdivision (b) is amended to substitute the term "minor" for the term "infant."

**Advisory Committee's Note**  
**December 31, 1967**

In connection with the 1967 amendment of Rule 81(c) to abolish the extraordinary writs of certiorari, quo warranto and mandamus as procedural devices, the statutory provisions appearing in 14 M.R.S.A., Chaps. 603, 605 and 607 were repealed by the 1967 Pub. Laws, Chap. 441, § 7. Included among the repealed statutory provisions is one (14 M.R.S.A. § 5402) excusing the Attorney General from being a party in quo warranto proceedings involving the title to office in a private corporation. The substance of the repealed statute is incorporated into Rule 17(a).

A new subdivision (c) is added to Rule 17 for the purpose of protecting the assured from loss of what may be a substantial claim for personal injury by application of the doctrine prohibiting splitting of causes of action. Frequently the insurance company, having wholly or partially reimbursed the assured for loss in a motor vehicle accident under the coverage of its collision policy, will sue the third party on the subrogated or assigned claim. Under Rule 17(a) the insurance company has an option of bringing such subrogated or assigned claim either in its own name or in the name of the assured. If the company commences action in the name of the assured for only the subrogated or assigned property damage claim, the assured will thereby be barred from commencing a separate action for the personal injury. *Pillsbury v. Kesslen Shoe Co.*, 136 Me. 235, 7 A.2d 898 (1939); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849 (1st Cir. 1947). By the new Rule 17(c) the assured will be informed of the insurer's intention to commence suit on the subrogated or assigned claim and can take appropriate action to protect his personal injury claim. He can gain such protection either by beating

the insurer to the courthouse or by joining the insurer in pressing both the personal injury and the property claim in a single action.

The first sentence of Rule 17(c) prohibits the assertion of any claim or counterclaim by the insurance company until it has given the required 10-day notice to the assured. On the other hand, the language of the last sentence of Rule 17(c), while imposing upon the assured the obligation in hortatory language to notify the insurer of his intention to assert a claim arising out of the same transaction or occurrence as the subrogated or assigned claim, does not bar the subsequent assertion of such a claim. It is, however, of obviously great importance that the insurance company be given notice of the intention on the part of the assured to bring suit and the new Form 32, which is the insurer's notice under Rule 17(c), specifies in strong language that Rule 17(c) requires the assured within the set time to notify the insurance company of his intention to bring suit. If the insurance company proceeds with its suit even after receiving notice from the assured and he is thereby prevented from recovering on his personal injury claim, the insurance company may well be required to respond in damages to the assured. In order to avoid that danger, as well as to avoid the other difficulties of divided control of litigation on both the property damage and personal injury claims, an insurance company may be well advised to assert the subrogated or assigned claim in its own name as the real party in interest. That latter course, which is permitted by Rule 17(a), would also have the advantage to the insurance company of eliminating the need of complying with the notice requirements of Rule 17(c).

Rule 17(c) does not resolve the difficulty that at times arises as to whether the insurer or the insured is entitled to manage the litigation when the subrogated property damage claim and the insured's personal injury claim are brought in a single proceeding. It would appear that the insured should have a right to manage the case. *Cf. Buzynski v. Knox County*, 159 Me. 52, 188 A.2d 270 (1963).

### **Explanation of Amendments March 22, 1965; November 1, 1966**

The amendment to Rule 17(a) was taken from a 1966 amendment to F.R. 17(a). The principal change is the provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the raising of the objection, for the real party in interest to ratify the commencement of the action or for him to be joined or substituted. The interests of justice dictate this result. In addition, there is a minor textual change to make it clear that the specific instances enumerated are

illustrations of the rule rather than exceptions to it. The word “bailee” is added to the illustrative list. A bailee suing on behalf of the bailor with respect to the property bailed is thus the real party in interest.

The last sentence of Rule 17(b), added by a 1965 amendment, was in general modeled on 14 M.R.S.A. § 6656 (applicable only to proceedings to quiet title). The rule as amended has, however, more general application than the statute. Appointment of a representative for absent parties, who indeed may be identified only by class description, may in the court’s discretion be used to aid in fully airing the issues of the litigation. There would appear to be no due process requirement of such an appointment, assuming that the due process standards of notice have been complied with.

### **Reporter's Notes December 1, 1959**

This rule is like Federal Rule 17, but with some eliminations and modifications. Unlike most states, Maine has not had the conventional real party in interest statute upon which Rule 17(a) is based. The rule will forbid suit in the name of the assignor of a non-negotiable chose in action and to this extent change the Maine law, *Rogers v. Brown*, 103 Me. 478, 70 A. 206 (1908), but the defendant now has the right to compel disclosure of the identity of the assignee and to recover costs against him. R.S.1954, Chap. 113, Sec. 168 (repealed in 1959).

The last sentence of subdivision (a) allows a subrogated insurer to sue in the name of the assured. This is consistent with the view that the injection into a trial of the fact that the defendant has liability insurance is improper and may result in a mistrial. *Ritchie v. Perry*, 129 Me. 440, 152 A. 621 (1930); *Deschaine v. Deschaine*, 153 Me. 401, 140 A.2d 746 (1958). At present the action must be in the name of the assured. *Rockingham, etc. Ins. Co. v. Bosher*, 39 Me. 253 (1855). Most but not all of the real party in interest statutes have been construed to require the insurer to be named as plaintiff, and the rule has been written so as to preclude that construction. This sentence is not in the federal rule.

## **RULE 17A. SETTLEMENT OF CLAIMS OF MINOR PLAINTIFFS**

(a) Motion or Application for Settlement. In any action commenced by or on behalf of a minor, the guardian, guardian ad litem, or next friend of such minor may move the court for an order of approval of settlement. If no action has been

commenced on a claim by a minor, any such representative may file an application in any court in which such an action might have been commenced, seeking an order of approval of settlement. The application shall contain a short and plain statement of the claim to be settled. No service of the application and no further pleadings shall be required unless directed by the court.

The motion or application and supporting papers may be prepared by the attorney for an adverse party or by an attorney obtained by an adverse party to represent the interests of the minor.

(b) Supporting Papers. Any motion or application filed in accordance with subdivision (a) of this rule shall be accompanied by:

(1) an affidavit or verified application of the moving party or plaintiff stating the terms of and any reasons for approving the settlement and any fee to be paid to an attorney for the minor and also stating that the movant or plaintiff was informed of the right to attend the hearing upon the motion or application and that the right to attend a hearing is waived, where court action without hearing is sought;

(2) A statement by the moving party or plaintiff describing the age of the minor, the nature of the injuries or damages suffered by the minor, and the facts of the event which led to the injury or damage. This statement shall be in sufficient detail to allow the court to evaluate the injuries or damages in determining whether to approve the settlement. Where the total amount of the proposed settlement exceeds \$5,000 or where the attorney who prepared the motion has any connection with a party adverse to the plaintiff, the statement shall have attached to it copies of any police reports, any emergency room reports of the incident and resulting injuries or damages, a statement from a physician indicating the nature of the injuries and expectations for recovery or permanent impairment, and such other reports of the injuries or damages and the incident which caused the injuries or damages as the court may require;

(3) An affidavit of the attorney who prepared the motion or application and the supporting papers stating whether or not the attorney was retained at the instance of, represents, or has any connection with a party adverse to the minor.

(4) Where a defendant is not represented by counsel, a statement signed by the defendant, or a representative of the defendant's insurer, indicating that the defendant consents to judgment in the settlement amount; and

(5) A draft proposed order which states all of the financial arrangements of the settlement, allocates the funds as indicated in the settlement, designates a depository of the funds received for the minor and subjects any withdrawals to court approval until the minor reaches majority.

(c) Hearing and Judgment. At the hearing on the motion or application the court may require the moving party or plaintiff, the minor, and any attorney representing the minor to attend, and may make such inquiry as it deems necessary into the circumstances giving rise to the claim, the nature and extent of the damages sustained by the minor, other proceedings concerning the same claim, and any other matters pertinent to the adequacy of the settlement. Under exceptional circumstances the court may appoint a referee under Rule 53 to make such inquiry and to make recommendations thereon. After hearing, the court may approve the settlement or order entry of final judgment in accordance with its terms or may, with the consent of the parties, make such other order as justice may require, including provisions for a trust created for the minor's benefit and for payments to be made to the minor after age 18. Judgment shall be entered without costs and shall approve the fee for the minor's attorney, if any.

(d) Custody of Proceeds. The court may order that the proceeds of the settlement be deposited to the credit of the minor with such depository, trustee or custodian and on such terms as the court may designate until the minor reaches majority. No withdrawal of funds so deposited shall be made unless approved by a justice or judge of the court in which the order of deposit was entered.

(e) Verification. Not later than 30 days after entry of the order approving the settlement, the attorney or party to whom the funds are paid shall file a sworn affidavit verifying that the funds paid have been deposited as required by the court order, stating the depository financial institution and account number, and certifying that a copy of the court's order with restrictions on withdrawal, if any, has been provided to the depository financial institution.

**Advisory Committee's Notes**  
**May 1, 2000**

The amendment substitutes the word “minor” for “infant” in the title. The text of the rule is not changed.

**Advisory Committee’s Notes**  
**May 1, 1999**

Rule 17A (c) and (d) are amended to give the court more flexibility in approving minor settlements. Prior to the amendment, the language of the rule appeared to limit the parties and the court to the deposit of funds in a bank. The best interests of the minor can be served by more flexible arrangements, such as trusts created and administered under court supervision. Although the parties now have the flexibility to propose a trust for the minor benefit, the court still retains final authority on approval of the terms of the trust and any withdrawals therefrom.

**Advisory Committee’s Notes**  
**June 2, 1997**

Subdivision (c) of Rule 17A is amended to make clear that the court approval of a minor settlement may include a provision for payments after the minor has reached the age of 18. This change authorizes the use of special needs trusts or other continuing payments where medical or other needs may be arranged for the minor’s best advantage early in the minor’s life. The court will continue to be guided by the minor’s best interests, as 14 M.R.S.A. § 1605 (Supp. 1995) intends.

**Advisory Committee’s Notes**  
**1988**

Rule 17A is amended to assure that the court receives sufficient information about the nature of a minor’s injuries and their cause to permit an informed evaluation of a request for settlement. The amendment is also intended to provide more protection to the minor by requiring verification of deposits and better confirmation that all parties have agreed to the settlement.

Throughout the Rule, the word “minor” has been substituted for “infant” as more in accord with current terminology.

Rule 17A(b) has been substantially rewritten. Paragraph (1) has been amended to specify procedures for waiving hearing if hearing is not desired. A new paragraph (2) has been added, requiring a detailed statement of the nature and

the causes of the minor's injury or damages, with special requirements for detail in independent reports where a settlement is for more than \$5,000 or is presented by adverse parties. A new paragraph (4) has been added to require written indication of approval of settlements by defendants not represented by counsel. Paragraph (5) has been added to require that a draft order be submitted, detailing the financial arrangements and fund distributions.

Rule 17A(e) has been added. The provision requires verification that required deposits have in fact been made and that the depository institution has received a copy of the court's order, including any restrictions on withdrawal.

**Advisory Committee's Note  
October 1, 1970**

This rule spells out for the first time the procedure for obtaining the court approval required by 18 M.R.S.A. § 3652 for settlement of the claim of an infant plaintiff. It is adopted out of a concern on the part of both the courts and the practicing bar for the protection of the rights of injured minors and for the avoidance of any appearance of impropriety on the part of the legal profession or laxness on the part of the judiciary. Previously, such settlements were generally approved through the medium of the so-called "friendly suit" in which an attorney, often secured and paid by the defending insurance company, sued on the minor's behalf. Such suit would then be settled upon petition of the defendant. While responsible counsel would see that the court was fully informed both as to the nature of the representation and as to the circumstances surrounding the claim and settlement, there was no duty to investigate or present evidence and no standards other than good faith and absence of fraud by which to measure the adequacy of counsel's presentation. *See Ayer v. Androscoggin & Kennebec R. R.*, 163 A. 270, 131 Me. 381 (1932). Moreover, under 18 M.R.S.A. § 3652 the court had sole discretion as to the procedure and criteria for approval of the settlement. The new rule substitutes for the friendly suit a procedure less subject to abuse and criticism and provides detailed guidelines for the court to follow whether settlement is sought under the new procedure or in ordinary adversary proceedings.

The statutory foundation for Rule 17A was laid by the recent amendment adding the following sentences to 18 M.R.S.A. § 3652 (*see* 1970 Laws, c. 590, § 22-A):

If no action has been commenced, an infant by next friend may apply to any court in which an action based on the claim of the

infant could have been commenced for an order approving the settlement of any such claim. An order approving such a settlement shall have the effect of a judgment.

The rule is based on N.Y.C.P.L.R. § 1207, R. 1208, with simplifications in the requirements for affidavits and hearing.

The procedure spelled out in the rule applies both where there is a pending action commenced on behalf of the infant (whether or not the action was commenced completely at arms length) and where a settlement agreement has been arrived at without the commencement of an action. In the latter case, the guardian or the other representative of the infant may file an application seeking an order of approval of settlement. Where there is a pending action the plaintiff representing the infant simply files a motion for an order of approval for settlement.

Rule 17A(a) expressly permits the motion or the application and also the supporting papers to be prepared by the attorney for an adverse party (typically the insurance company lawyer) or by an attorney obtained by the adverse party. The rule thus eliminates the sham involved in the prior practice of the "friendly suit." The rule makes no attempt to create the appearance of independence upon the part of the attorney preparing the papers for the infant. Rather the emphasis is put upon spelling out on the record in the form of an affidavit of the attorney who prepared the papers the full facts relating to his connections with the adverse party.

The rule does not, and indeed cannot, eliminate the responsibility of the court to investigate the reasonableness of the proposed settlement. On the other hand, the supporting papers required by the rule are intended, without imposing unnecessarily burdensome paper work, to provide the court with the essential information on the subject. That information must be made a part of the record in an affidavit sworn to by the guardian or other representative of the infant. Subdivision (c), by expressly providing that the court may require the guardian or other representative as well as the infant and any attorney representing him to attend the hearing, encourages the court to make the hearing something more than a perfunctory matter. Counsel undoubtedly will try to make the affidavit of the guardian or other representative of the infant sufficiently full to avoid the delay and expense of a hearing at which all such persons are required to be present in person.

Subdivision (c) spells out the matters as to which the court should make inquiry relating to the adequacy of the settlement. The court may appoint a referee to investigate the adequacy of the settlement and to make his recommendations to

the court. As stated in Rule 53(b) a "reference shall be the exception and not the rule." A referee should not be appointed as a routine matter, but only under exceptional circumstances or, in the language of Rule 53(b) "upon a showing that some exceptional condition requires it." Such "exceptional circumstances" might exist, for example, if the issue of liability on the infant plaintiff's claim involved serious difficulties in the proof of essential facts or doubtful questions of law and a settlement is proposed representing far less than full compensation for the injuries received by the plaintiff infant. It would obviously be improper for the referee subsequently to represent any party in regard to the infant's claim or any related claim. *See* Disciplinary Rule 9-101(A) of the Code of Professional Responsibility and in particular Note 7 appended thereto.